Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–587 OF 2004
ZAMANI A RAHIM J
8 FEBRUARY 2013

Family Law — Children — Paternity — Whether court could compel person to undergo DNA test to confirm if he was natural father of child — Whether order could be made in best interests of child — Whether courts should depart from decision in Peter James Binsted v Juvencia Autor Partosa [2000] 2 MLJ 569 and keep abreast with times — Whether order to undergo DNA testing to determine paternity was not causing 'hurt' within meaning of Penal Code — United Nations Convention on Rights of the Child articles 3(1) & 7

The issue in this case was whether the court could compel a person to undergo DNA testing to determine if he was the natural father of a child. The plaintiff, Lee Lai Ching, was the natural mother of Lim Chee Zheng ('the child'). She alleged the defendant was the child's natural father and wanted the court to order him to undergo DNA testing to determine the issue. The defendant denied he was the child's father and refused to undergo the test relying on the authority of *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569 ('Peter James Binsted's case'). In that case, the High Court held that a person could not be compelled under the existing law in Malaysia to undergo DNA testing to determine paternity. It ruled that whoever subjected a person against his will to undergo such a test would be voluntarily causing hurt, an offence under s 323 of the Penal Code ('Code'). Causing 'hurt' within the meaning of s 319 of the Code meant causing 'bodily pain, disease or infirmity' to another person. In the instant case the court determined the issue by considering whether ordering the defendant to undergo DNA testing was in the best interests of the child. The plaintiff relied on the United Nations Convention on the Rights of the Child ('CRC') to which the Malaysian Government had acceded in 1995 albeit with reservations to certain of the articles therein. Article 3(1) of the CRC provided that the best interests of the child shall be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The plaintiff also relied on art 8(1) and (2) of the Federal Constitution to say the child in the instant case was entitled to the equal protection of the law and therefore had the right to know who his biological father was. The Court considered the fact that whenever circumstances merited it, international conventions and treaties to which Malaysia was signatory had been invoked by the High Court to resolve many a

dispute and that in several other jurisdictions such as the United States of America, Canada, United Kingdom, France, Germany, Israel and China, the courts had power to order paternity tests.

Held, ordering the defendant to undergo DNA testing to determine the child's paternity:

(1) In the exercise of judicial discretion and the inherent power of the Court and having regard to article 3 of the CRC, it was in the best interests of the child that the defendant be ordered to undergo DNA testing to determine the child's paternity (see para 34).

(2) Article 7 of the CRC, which 'inter alia' stated that as far as possible a child had the right to know and be cared for by his or her parents, was also applicable as it did not contradict but was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia. Article 7 was consistent with the provisions of fundamental liberties in the Federal Constitution. The minor had the right to know whether the defendant was his father (see paras 39–40).

(3) The decision in *Peter James Binsted*'s case was distinguishable as the court there did not consider the issue of the best interests of the child. The issue there was whether the father of the child would be subjected to hurt if DNA testing was ordered (see para 20).

(4) An order for DNA testing should not be construed as causing 'hurt' as defined in the Penal Code because the mens rea (intention) or objective behind the test was to determine paternity. No intentional harm would be caused as only a blood sample was required for the test. With the advent of technology, even extraction of blood might not be necessary and a simple swab of sweat or saliva might suffice (see paras 16–17).

(5) The courts in Malaysia must be robust and not lag behind and allow Malaysian criminal or civil jurisprudence to be shackled by the ghost of *Peter James Binsted*'s case which was decided within a narrow scope 13 years ago (see para 49).

[Bahasa Malaysia summary

Isu dalam kes ini adalah sama ada mahkamah boleh memaksa seseorang menjalani ujian DNA untuk menentukan jika dia adalah bapa semula jadi kanak-kanak. Plaintif, Lee Lai Ching, adalah ibu semula jadi Lim Chee Zheng ('kanak-kanak tersebut'). Dia mendakwa defendan adalah bapa semula jadi kanak-kanak tersebut dan ingin mahkamah memerintahkannya untuk menjalani ujian DNA untuk memastikan isu tersebut. Defendan menafikan dia bapa kepada anak tersebut dan enggan menjalani ujian bergantung kepada autoriti kes *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569 ('kes *Peter James Binsted*'). Dalam kes itu, Mahkamah Tinggi memutuskan bahawa

seseorang itu tidak boleh dipaksa di bawah undang-undang sedia ada di Malaysia untuk menjalani ujian DNA untuk menentukan paterniti. Adalah diputuskan bahawa sesiapa yang memaksa seseorang itu manjalani ujian tersebut tanpa kerelaannya dengan sengaja menyebabkan kecederaan, iaitu satu kesalahan di bawah s 323 Kanun Keseksaan ('Kanun'). Menyebabkan 'kecederaan' dalam maksud s 319 Kanun tersebut bermaksud menyebabkan 'bodily pain, disease or infirmity' kepada seseorang lain. Dalam kes ini mahkamah menentukan isu tersebut dengan mengambilkira sama ada dengan memerintahkan defendan menjalani ujian DNA adalah demi kepentingan kanak-kanak tersebut. Plaintif bergantung kepada Konvensyen Bangsa-Bangsa Bersatu mengenai Hak Kanak-Kanak ('KHK') dengan persetujuan Kerajaan Malaysia pada tahun 1995 walaupun terdapat reservasi kepada perkara-perkara tertentu berkenaannya. Perkara 3(1) KHK memperuntukkan bahawa 'the best interests of the child shall be the primary consideration' dalam semua tindakan berkaitan kanak-kanak, sama ada dilaksanakan oleh institusi-institusi kebajikan sosial awam atau persendirian, mahkamah perundangan, pihak berkuasa pentadbiran atau badan perundangan. Plaintif juga bergantung pada perkara 8(1) dan (2) Perlembagaan Persekutuan untuk mengatakan kanak-kanak dalam kes ini berhak mendapat perlindungan sama dan oleh demikian mempunyai hak untuk mengetahui siapa bapa kandungnya. Mahkamah telah mengambil kira fakta bahawa apabila keadaan mewajarkannya, konvensyen dan triti antarabangsa yang mana telah ditandatangani oleh Malaysia digunakan oleh Mahkamah Tinggi untuk menyelesaikan banyak pertikaian dan bahawa dalam beberapa bidang kuasa lain seperti Amerika Syarikat, Kanada, United Kingdom, Perancis, Jerman, Israel dan China, mahkamah-mahkamah mempunyai kuasa untuk memerintahkan ujian paterniti.

Diputuskan, memerintahkan defendan menjalani ujian DNA untuk menentukan paterniti kanak-kanak:

(1) Dalam melaksanakan budi bicara kehakiman dan kuasa sedia ada mahkamah dan mengambil kira perkara 3 KHK, adalah demi kepentingan kanak-kanak tersebut bahawa defendan diperintahkan untuk menjalani ujian DNA untuk menentukan paterniti kanak-kanak tersebut (lihat perenggan 34).

(2) Perkara 7 KHK, yang antara lain menyatakan bahawa setakat mana mungkin seseorang kanak-kanak mempunyai hak untuk mengetahui dan dijaga oleh ibu bapanya, adalah juga boleh terpakai kerana ia tidak bertentangan tetapi adalah selaras dengan Perlembagaan Persekutuan, undang-undang negara dan polisi-polisi Kerajaan Malaysia. Perkara 7 adalah konsisten dengan peruntukan-peruntukan kebebasan asas dalam Perlembagaan Persekutuan. Kanak-kanak di bawah umur tersebut mempunyai hak untuk mengetahui sama ada defendan adalah bapanya (lihat perenggan 39–40).

(3) Keputusan kes *Peter James Binsted* adalah berbeza kerana mahkamah di situ tidak mengambil kira isu demi kepentingan kanak-kanak tersebut. Isu di situ adalah sama ada bapa kanak-kanak itu akan menyebabkan dirinya terjejas jika ujian DNA diperintahkan (lihat perenggan 20).

(4) Perintah untuk ujian DNA tidak patut ditafsirkan sebagai menyebabkan kecederaan sebagaimana ditafsirkan dalam Kanun Keseksaan kerana mens rea (niat) atau objektif di sebalik ujian itu adalah untuk menentukan paterniti. Tiada bahaya secara sengaja disebabkan kerana hanya sampel darah yang diperlukan untuk ujian itu. Dengan adanya teknologi, pengambilan darah mungkin tidak pun diperlukan dan adalah mencukupi dengan mengambil bahan uji mudah seperti peluh atau air liur (lihat perenggan 16–17).

(5) Mahkamah-mahkamah di Malaysia perlu teguh dan tidak ketinggalan dan membenarkan perundangan jenayah atau sivil Malaysia dibelenggu oleh kes *Peter James Binsted* yang telah diputuskan dalam skop terbatas 13 tahun lalu (lihat perenggan 49).]

Cases referred to

Lai Meng v Toh Chew Lian [2012] 8 MLJ 180, HC (refd)
Lau Zhan Chen (An Infant by His Mother and Next Friend Lau Fatt Wan (f)) v Makoto Togase & Ors [1994] MLJU 344; [1995] 1 CLJ 841, HC (refd)
Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832, HC (refd)
Peter James Binsted v Juvencia Autor Partosa [2000] 2 MLJ 569, HC (not folld)
L, Re [1968] 1 All ER 20, CA (refd)

Legislation referred to

Federal Constitution art 8(1), (2)
Penal Code ss 319, 323

T Tharumarajah (T Tharumarajah & Associates) for the plaintiff.
Alan Lim Wei Lun (Gan Teik Chee & Ho) for the defendant.

Zamani A Rahim J:

INTRODUCTION

[1] This is a writ action filed by the plaintiff (as the next friend of Lim Chee Zheng and on behalf of herself) against the defendant. Having been agreed by both parties, this action is to be decided on points of law of which will be dealt with below.

BRIEF FACTS

[2] The plaintiff is the natural mother of Lim Chee Zheng ('the minor') and

has filed a claim against the defendant for amongst others, that the defendant undergoes a deoxyribonucleic acid 'DNA' test to determine the paternity of the minor.

[3] The defendant has denied he is the father of the minor and has refused to undergo a DNA test to confirm the minor's paternity.

[4] The plaintiff met the defendant at an entertainment centre and consequently at the material time, the plaintiff was offered and accepted a commercial contract to be employed as a singer in the defendant's company, Follow Me Sdn Bhd. The defendant was a director of the company at the material time. The plaintiff and defendant began an intimate relationship from the time the contract commenced.

[5] The defendant denies that the plaintiff and defendant had an intimate relationship and as a result of that relationship, the minor was conceived and born.

PRELIMINARY ISSUES

[6] Based on the facts of this case, the issues for this court consideration are as follows:

(a) whether the defendant, Lim Hooi Teik, could be compelled to give and/or supply a sample of his blood for a DNA test to determine the paternity of the child by the name of Lim Chee Zheng; and

(b) in the event the answer is yes, such consequential orders be made to enable the defendant to give such specimens required by the relevant hospital.

Can a DNA test resolve the issue of paternity?

[7] In the case of *Lau Zhan Chen (An Infant by His Mother and Next Friend Lau Fatt Wan (f)) v Makoto Togase & Ors* [1994] MLJU 344; [1995] 1 CLJ 841, the petitioner sought amongst others, for a declaration that the petitioner was the legitimate child of the first and second respondents.

[8] Both the first and second respondents had willingly undergone DNA testing to determine the petitioner's paternity. Therefore the issue therein was whether the blood test was necessary and whether the DNA test was conclusive as evidence of paternity.

[9] Amongst others, Abdul Malik Ishak J (as His Lordship then was) whilst making reference to the decision of Lord Denning MR held as follows:

> In my judgment, where scientific evidence by means of a blood test can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done, in the absence of strong reasons to the contrary.

[10] On blood tests, Lord Denning MR had this to say in *Re L* [1968] 1 All ER 20 at p 23:

> Blood tests are a modern development. Medical science is able to put the blood of individuals into definite groups; and by examining the blood of a given man and a child, the medical men can tell whether the man could or could not be the father of the child. They cannot say positively of any man that he is the father; but they can say positively that a given man cannot be the father, because the blood groups of him and the child are so different. The science has achieved such a degree of accuracy that, when a man is in truth not the father of a child, and desires to prove it, there is at least a seventy per cent chance, if blood tests are taken, that the doctors can prove positively that he is not the father. In some cases the chance is even higher. As, for instance, when, as in the present case, we know that one or other of two given men is the father, there is a ninety percent chance that the doctors can say positively that one of them is not the father, with the irresistible inference that the other man is the father.

[11] It is common knowledge that in the interest of justice, blood tests are accepted and deemed to resolve the issue of paternity conclusively.

[12] In protecting the interests of the minor herein, this court may accept the DNA test results to determine if the defendant is indeed the minor's biological father. Once the status of the defendant is determined, the interests of the minor will be secured and/or protected directly and indirectly. The status of the defendant will be positively ascertained after the DNA tests.

[13] However, the defendant has refused to undergo a DNA test willingly. Therefore this court would have to take a step further in answering the next question.

Can the defendant be compelled to give a sample of his blood for a DNA test, to determine the paternity of the minor?

[14] It is the defendant's contention that the decision in *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569 where KC Vohrah J (as His Lordship then was) held as follows:

There is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity. In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing. If a person refuse to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s 319 of the Penal Code against his will by submitting himself to such testing. Whoever carried out such testing without the person's consent would violate s 323 of the Penal Code for voluntarily causing hurt to the person and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person (seep 571C–D).

[15] For ease of reference the meaning of hurt pursuant to s 319 of the Penal Code reads as follows:

Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt

[16] Therefore, an order for DNA testing should not be construed as 'hurt' as defined in the Penal Code because the mens rea (intention) or objective behind the DNA test is to determine the paternity of the minor.

[17] No intentional harm is caused to the defendant as a sample of his blood is required for the sole purpose of a DNA test. Further, with the advent of technology, DNA test may not necessarily require an extraction of the defendant's blood but a simple swab of the defendant's sweat or saliva would suffice.

[18] However, the interest of the minor and the argument should not limit itself to the 'hurt' that may be caused to the defendant (which is denied by the plaintiff), should the defendant be ordered to undergo DNA testing.

[19] What this court should consider is whether in determining the paternity of the minor, the DNA test on the defendant is in the best interest of the minor?

[20] Therefore the decision in *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569, may be distinguished as the said decision the court therein had not considered whether it was in the best interest of the child that DNA test be ordered. The issue therein gravitated toward whether the father of the child would be subject to hurt if a DNA test is ordered. The interest of the child therein was not considered at all.

United Nations Convention on the rights of the child

[21] On the other hand, the plaintiff seeks to rely on the United Nations

Convention on the Rights of the Child ('CRC') of which the Government of Malaysia acceded to on 17 February 1995, albeit expressing reservations to certain articles of the CRC.

[22] However Malaysia's reservations are to articles 1–2, 7, 13–15, 28 (para 1(a)) and 37 of the CRC but at the same time declared that the said provisions shall be applicable only if they are in conformity with our Constitution, national laws and national policies of the Government of Malaysia.

[23] Therefore article 3(1) of the CRC provides as follows:

> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*

[24] The plaintiff submits that the primary consideration of this court is the paramount or best interests of the minor. However this court is not suggesting that the rights of the defendant is to be negated altogether but to consider that the interest of the minor shall take priority or precedence.

[25] If the birth certificate of the minor (see p 1 of the plaintiff's bundle of document), it is noted that the particulars of the father have been omitted. Would it be just to the minor not know his father if the answer to that only dictates by a simple DNA test?

[26] The plaintiff implores this court to consider that having a DNA test ordered against the defendant is indeed in the best interest of the minor. Closure as to the paternity of the minor will be achieved and the minor will no longer be deprived of not knowing who his biological father is.

[27] In *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180, the court was faced with, amongst others, the following issues:

(a) whether the court had the jurisdiction to grant access to the putative father of an illegitimate child; and

(b) whether access should be granted in the case.

[28] Nevertheless, Yeoh Wee Siam J held amongst others that 'This court had the jurisdiction to decide on matters regarding access by a putative father to an illegitimate child after considering what was for welfare and best interest of the child (see para 49)'.

[29] In coming to the decision whether it was in the best interest of the child that the putative father be granted access to the child, the learned judge made the following consideration:

> [87] The Government of Malaysia acceded to the CRC on 17 February 1995 but in a declaration dated 19 July 2010 it expressed its reservations with respect to certain articles (which did not include articles 3 and 9) and declared that the said provisions shall be applicable only if they are in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia.
>
> [88] The CRC applies to both legitimate and illegitimate children.
>
> [89] Both articles 3 and 9 of the CRC state that the best interests of the child shall be the consideration for the matters provided therein. This is consistent with the welfare principle that I had earlier dealt with.

[30] Although the learned judge in *Lai Meng v Toh Chew Lian*'s case held that granting access was not in the best interest of the child but what is of primary importance is the incorporation of the CRC into Malaysian Common Law.

[31] Therefore having precedent set in *Lai Meng v Toh Chew Lian*, where the test, 'best interests of the child' provided by the CRC was adopted and considered by our High Court in determining the issue of access.

[32] By adopting the same approach, and by invoking article 3 of the CRC and consider that the best interest of the minor shall be the primary consideration in determining whether the defendant can be compelled to undergo a DNA test to determine the paternity of the minor.

[33] In addition, the applicability of International Conventions/Treaties does not pose as unfamiliar to our High Court, an example is seen in *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832, where the court was tasked with deciding whether an untrained teacher who had an offer for employment as a temporary teacher withdrawn when she answered that she was pregnant. Zaleha Yusof J ruled that she was indeed discriminated and applied the United Nations Convention in Elimination of All Forms of Discrimination against Women of which Malaysia has been a signatory to since 1995.

[34] Therefore, with reference to the action before this court, having no specific provision of statute to order DNA testing, in the exercise of my judicial discretion having regard to article 3 of the CRC, it is in the best interest of the minor that the defendant be ordered to undergo DNA testing to determine the paternity of the minor.

A The fundamental liberties of the minor

[35] Where there is no specific statute allowing and/or disallowing a DNA test being a mechanism used to identify a person's identity, the plaintiff also submits that this court must also consider the fundamental liberties of the minor, in that the minor's interest is taken into consideration.

B

[36] Article 8(1)–(2) of the Federal Constitution provides as follows:

C

> Equality
>
> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

D

E

[37] The minor is entitled to the equal protection of the law and therefore has a right to know who his biological father rightfully is. This can only be confirmed if the defendant is ordered to undergo a DNA test to confirm the same.

F

[38] Consequently, article 7 of the CRC albeit being a reservation of the Malaysian Government (as discussed above) may be invoked.

[39] Article 7 of the CRC reads as follows:

G

> Article 7
>
> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

H

[40] Article 7 of the CRC is consistent with the provisions of fundamental liberties as provided in the Federal Constitution. The minor has a right to know whether the defendant is his father and it is only in the best interest of the minor that a DNA test is ordered to confirm the same.

I

[41] Therefore article 7 of the CRC should be invoked and rendered applicable as it does not contradict but very much in conformity with our Federal Constitution, national laws and national policies of the Government of

Malaysia.

CONCLUSION

[42] Having no specific provision of statute that allows and/or disallows an order for DNA testing for the purposes of paternity. I have download from Wikipedia, the free encyclopedia on the legal issues on parental testing in other jurisdictions.

[43] In the United States, paternity testing is fully legal. A court ordered paternity test may be used as evidence in court proceedings.

[44] In Canada, personal paternity testing kits are available to fathers. The courts also have the power to order paternity tests during divorce cases.

[45] In the United Kingdom ('UK'), tests are sometimes ordered by courts when proof of paternity is required. The UK Ministry of Justice accredits bodies that can conduct this testing.

[46] In France and Germany, any paternity testing without a court order is banned, due to fears that more families could be broken by divorce if all fathers were given access to them.

[47] In Israel, private paternity testing kits are available to fathers. The family courts have the power to order paternity tests against the will of the father in divorce and child support cases, as well as in other cases such as determining heirs and settling the question involving the population registry.

[48] In China, paternity testing is legally available to fathers who suspect their child is not theirs, though in such cases, biological bond is proven about 90% of the time. Under Chinese law, a paternity test is also required for any child born outside the one-child policy in order for the child to be eligible for a 'hukou' or family registration record.

[49] It would appear that with varying degree of requirements or stipulations, the paternity testing may be ordered by the courts in the above mentioned jurisdictions. Likewise we too must not be lagging behind but be robust and cannot allow our criminal or civil jurisprudence be shackled by the ghost of *Peter James Binsted*, which was decided within a narrow scope about 13 years ago. Much water has flowed under the bridge since then.

[50] In exercising my inherent power and discretion of the court and indeed it is in the best interest of the minor that the defendant is hereby ordered to

provide a sample for DNA testing to determine the minor's paternity as prayed in prayer 13(b) of amended statement of claim and a cost of RM3,000.

[51] It is ordered accordingly.

Defendant ordered to undergo DNA testing to determine child's paternity.

Reported by Ashok Kumar